

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BOBBY JOE GATLIN,  
Petitioner,  
v.  
STEVE SINCLAIR,  
Respondent.

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) No. CV-10-3046-CI  
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) REPORT AND RECOMMENDATION FOR  
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) ORDER DENYING PETITIONER'S  
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) SECOND MOTION TO AMEND HABEAS  
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) PETITION WITH LEAVE TO RENEW  
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BEFORE THE COURT on Report and Recommendation is Petitioner's second Motion to Amend Habeas Petition, Respondent's Response, and Petitioner's Objection to Respondent's "late filing."<sup>1</sup> (ECF. No. 25, 26, 28.) Petitioner appears *pro se*; Respondent is represented by Washington State Assistant Attorney General John Joseph Samson. The parties have not consented to proceed before a magistrate judge.

## A. BACKGROUND

Petitioner filed for habeas relief in federal court on July 23,

<sup>1</sup> The court has considered Petitioner's objection. (ECF No. 28.) The file indicates Respondent timely filed his response to Petitioner's Motion to Amend within five days after the Motion was refiled under the above cause number and served on January 27, 2012. (ECF No. 24, 25, 26.) Under LR 7.1(e), an opposing party shall have at least 14 days after service to file a response to a non-dispositive motion and 21 days for dispositive motions. Therefore, Petitioner's objection is unfounded.

1 2010, challenging his 2004 Yakima County jury conviction on the  
2 grounds of ineffective assistance of counsel in violation of his  
3 Fifth, Sixth, and Fourteenth Amendment rights. (ECF No. 1.)  
4 Respondent timely filed a response in which he conceded the  
5 ineffective assistance of counsel claims were properly exhausted.  
6 (ECF No. 6 at 6.) On January 18, 2011, Petitioner filed a Motion to  
7 Amend his habeas petition to add claims of due process violations  
8 pertinent to his original Petition. (ECF No. 14, 20.) District  
9 Judge Edward F. Shea denied his Motion to Amend on May 31, 2011,  
10 with leave to renew within sixty days. (ECF No. 23.) Judge Shea  
11 ordered a renewed motion for leave to amend the original Petition  
12 must "be supported by a proposed first amended petition that  
13 identifies why the proposed additional claims are timely and  
14 exhausted," and be in the proper format. (*Id.*) Petitioner did not  
15 renew his motion within the specified deadline.

16 More than seven months later, on December 19, 2011, Petitioner  
17 filed in this court a successive Petition for Writ of Habeas Corpus,  
18 in which he challenged his 2004 Yakima County jury conviction on due  
19 process grounds. (Eastern District of Washington U.S. District  
20 Court Case Number CV-11-3124-JPH, ECF No. 1.) The court construed  
21 the second Petition as a Motion to Amend the Petition in the above-  
22 captioned matter, and ordered the successive Petition be filed as a  
23 second Motion to Amend in this case. (ECF No. 24.) Respondent  
24 responded on February 2, 2012, and the second Motion to Amend was  
25 set for hearing without oral argument.

26 **B. DISCUSSION**

27 In Judge Shea's Order allowing Petitioner to renew his Motion  
28 to Amend the original Petition, the court gave specific instructions

1 to Petitioner on the contents and format of a renewed motion. (ECF  
2 No. 23.) Plaintiff failed to comply with the court's Order before  
3 the sixty-day deadline. Petitioner's effort to characterize his  
4 untimely filed second Motion to Amend as a successive petition is  
5 unsuccessful.

6 In this second Motion to Amend, Petitioner failed to file an  
7 amended petition, as directed, to replace entirely the original  
8 Petition which includes three fully exhausted ineffective assistance  
9 of counsel claims. (ECF No. 1; ECF No. 23 at 1-2.) As a result, if  
10 the court were to grant the second Motion to Amend, the exhausted  
11 ineffective assistance of counsel claims would not be incorporated  
12 into the First Amended Petition and, therefore, would not be  
13 considered by the court.

14 In addition, the new claim in the second Motion to Amend is  
15 time-barred by the one year statute of limitations under the  
16 Antiterrorism and Effective Death Penalty Act (AEDPA) unless the new  
17 claim relates back to the original Petition. *Mayle v. Felix*, 545  
18 U.S. 644, 664 (2005). The relation back doctrine in a habeas  
19 proceeding is stricter than FED. R. Civ. P. 15(c)(1): the new claim  
20 must be "tied to the same core of operative facts" as exhausted  
21 claims in the original petition. *Mayle*, 545 U.S. at 664. The fact  
22 that a new claim relates to the same trial or judgment is not  
23 enough. *Id.*

24 In this case, the AEDPA statute of limitations expired on  
25 August 30, 2010. (See ECF No. 22 at 3.) Plaintiff is attempting to  
26 add a new due process claim relating to alleged unfairness in the  
27 trial proceedings. This claim is not tied to the original claims of  
28 ineffective assistance of counsel by a common core of operative

1 facts; therefore, the due process claim does not relate back and is  
2 time-barred by AEDPA. *Id.*

Finally, Petitioner's new claim is procedurally barred under state law and federal law. RCW 10.73.090(1). Plaintiff's attempt to exhaust his due process claim in state court was unsuccessful because he filed his personal restraint petition more than a year after his judgment and sentence became final. The Washington Supreme Court denied his second Petition for Review, finding expressly that the due process claim was time-barred under state law and no exemptions under RCW 10.73.100 applied. (ECF No. 25 at 43-44.) See *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

12           Granting Petitioner's second Motion to Amend his original  
13 habeas Petition to include a time-barred claim and preclude federal  
14 review of Petitioner's properly exhausted claims would not serve the  
15 interests of justice or the "vital interest" served by federal  
16 procedural rules. Accordingly, **IT IS RECOMMENDED** Petitioner's  
17 second Motion to Amend Habeas Petition (**ECF No. 25**) be **DENIED**.

## OBJECTIONS

19 Any party may object to a magistrate judge's proposed findings,  
20 recommendations or report within **fourteen (14)** days following  
21 service with a copy thereof. Such party shall file written  
22 objections with the Clerk of the Court and serve objections on all  
23 parties, specifically identifying the portions to which objection is  
24 being made, and the basis therefor. Any response to the objection  
25 shall be filed within **fourteen (14)** days after receipt of the  
26 objection. Attention is directed to FED. R. CIV. P. 6(d), which adds  
27 additional time after certain kinds of service.

28 A district judge will make a de novo determination of those

1 portions to which objection is made and may accept, reject, or  
2 modify the magistrate judge's determination. The judge need not  
3 conduct a new hearing or hear arguments and may consider the  
4 magistrate judge's record and make an independent determination  
5 thereon. The judge may, but is not required to, accept or consider  
6 additional evidence, or may recommit the matter to the magistrate  
7 judge with instructions. *United States v. Howell*, 231 F.3d 615, 621  
8 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), FED. R. CIV. P.  
9 72(b)(3); LMR 4, Local Rules for the Eastern District of Washington.

10 A magistrate judge's recommendation cannot be appealed to a  
11 court of appeals; only the district judge's order or judgment can be  
12 appealed.

13 The District Court Executive is directed to file this Report  
14 and Recommendation and provide copies to Petitioner, counsel for  
15 Respondent and District Judge Edward Shea.

16 DATED April 20, 2012.

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S/ CYNTHIA IMBROGNO  
19 UNITED STATES MAGISTRATE JUDGE  
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